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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1509

STATE OF UTAH, et al.,
Appellants,
vs.
JAMES JIM, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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The Navajo Tribe of Indians hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the Solicitor General and of the attorney for appellants has been obtained. The consent of the attorney for appellees was requested but refused.

The beneficiaries of the 1933 Act of Congress and the 1968 Amendment here in question are members of the Navajo Tribe. The judgment of the District Court, holding the 1968 Amendment unconstitutional, would restrict use of the 37½% royalty fund to about 10% of the Navajo Indians residing in San Juan County Utah. The remaining 90% of the Navajo Indians residing on or adjacent to the Reservation in San Juan County would be

deprived of desperately needed educational and economic benefits accruing from the multi-million dollar royalty fund in question. The Navajo Tribe exercises general governmental powers over the Utah Reservation, including the obligation to provide for the general welfare of Tribal members. The decision of the District Court, which balkanizes the Utah Reservation into a few rich geographic islands to the detriment of the remaining 90% of the Navajo Indians in San Juan County, will seriously affect the ability of the Navajo Tribe to fullfill its governmental responsibilities to all Utah Navajos.

In the District Court all parties argued the constitutionality of the 1968 Amendment largely on the assumption that such Amendment in fact effected a change in the class of Indian beneficiaries created by the 1933 Act. It is the position of *amicus curiae*, set forth in the attached brief, that the 1968 Amendment effected no such change and accordingly that the constitutional questions posed by the parties need not be reached.

Respectfully submitted,

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BRIEF OF THE NAVAJO TRIBE OF INDIANS, AS AMICUS CURIAE, IN THE SUPPORT OF JURISDICTIONAL STATEMENT

The portion of the Navajo Indian Reservation located within the State of Utah was created between 1884 and 1958 by two Acts of Congress and two Executive Orders.[1] This lawsuit has its origins in 47 Stat. 1418 (hereinafter referred to as "the 1933 Act") which added two areas (hereinafter referred to as "the Aneth Extension") to the Utah Reservation. The 1933 Act provided that 37½% of any oil royalties derived from the lands added to the Reservation would be aministered by Utah for the benefit of the Navajos, providing in pertinent part:

[1]Exec. Order of May 17, 1884; Exec. Order No. 324A (March 10, 1905); 47 Stat. 1418 (1933); 72 Stat. 1686 (1958).

"Should oil or gas be produced in paying quantities within the lands hereby added to the Navajo Reservation, 37½ per centum of the net royalties accruing therefrom derived from tribal leases shall be paid to the State of Utah: *Provided*, That said 37½ per centum of said royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described in section 1 hereof, or for the benefit of the Indians residing therein."

In 1968, Congress amended the foregoing provision of the 1933 Act in part by deleting the language following the word "Utah" and adding new language, the pertinent part of which provides that such royalties shall be expended by Utah "for the health, education, and general welfare of the Navajo Indians residing in San Juan County." 82 Stat. 121 (hereinafter referred to as "the 1968 Amendment"). The question presented is whether the 1968 Amdenment constitutes an unconstitutional taking of rights previously vested in a different class of beneficiaries by the 1933 Act.

Neither the language nor the legislative history of the 1933 Act support the judgment of the District Court that rights were thereby exclusively vested in residents of the Aneh Exension as a class.[2] The dispositive language of that Act relating to beneficiaries consists of three disjunctive clauses, each separated by the word "or". The first clause, providing for expenditures by Utah "in the tuition of Indian children in white schools . . .", contains no geographical restriction whatever. Thus, on its face, the 1933 Act can be read to describe a class of beneficiaries consisting of the

[2]The District Court's opinion [Finding of Fact No. 16] suggests that the class of beneficiaries intended by the 1933 Act was previously determined in *Sakezzie v. Utah State Indian Affairs Commission*, 198 F.Supp. 218 (1961), 215 F.Supp. 12 (1963). However, that case did not involve any factual question as to the class of beneficiaries falling within the "tuition of Indian Children clause . . .", and the Court's holding on the facts presented was reached by reference to other clauses of the 1933 Act. Hence determination of the question here presented is not precluded by doctrines of collateral estoppel. *Restatement of Judgments* §68 (1942 Ed.), 1948 Supp. 336-7 (1949).

entire Navajo Tribe (or at least all children in the Navajo Tribe). That reading is supported by the fact that the Act grants the lands described therein to the Navajo Tribe (rather than any subgroup thereof) and makes reference to "37½ per centum of the net royalties accruing therefrom derived from *tribal* leases . . ." [emphasis supplied].

On the other hand, the central feature of the entire 37½ percent provision was designation of the State of Utah as trustee, and that fact militates in favor of Congressional intent to limit the class of beneficiaries to those Navajos residing within the jurisdiction of Utah. Thus, while the language of the 1933 Act may not define the intended class of beneficiaries with perfect clarity, it quite clearly does not restrict the beneficiaries to residents of the Aneth Extension.

The legislative history of the 1933 Act likewise suggests that the intended beneficiaries were to be most or all of the Navajos residing in Utah. Both the House Report [H.R. Rep. No. 1883, 72d. Cong., 2d Sess. (1933)] and the Senate Report [S. Rep. No. 1199, 72d. Cong., 2d. Sess. (1933)] preceding the 1933 Act contain a memorandum from the Commissioner of Indian Affairs disclosing that the Commissioner had obtained the support of Utah citizens for the legislation on the basis of the understanding set forth in a "Memorandum of Agreement" which is printed in the Reports. Paragraph 4 of the Memorandum of Agreement provides that "The 37½ royalty clause in the above bill [H.R. 11735] is to remain, but the State of Utah is free to change to the usual form." While apparently no such change "to the usual form" was in fact made,[3] such language does suggest that all parties understood that the rather inelegant phraseology of the Bill should be understood by reference to the "usual form" of such clauses.

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[3]The royalty clause language in the Bill as originally introduced in the first session of the Seventy-second Congress is identical to the language as passed in the second session.

The 37½ percent clause had its genesis in the General Leasing Act of 1920 which opened the public domain to oil leasing with the proviso that the states would receive 37½ percent of the royalties "to be used by such State or subdivisions thereof for the construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct . . ." 30 U.S.C. § 191 (1920). *See* L. C. Kelly, *The Navajo Indians and Federal Indian Policy* (1968) at 37-101. This legislative antecedent, authorizing broad categorical expenditures without limiting beneficiaries to persons actually residing on the leased lands, suggests that the intent of the 1933 Act was to give Utah broad authority to make expenditures for all Navajo Indians in Utah. Whatever the precise limits intended, neither the language nor the history of the 1933 Act support appellees' contention that exclusive rights to the royalty monies were vested in the residents of the Aneth Extension.

The 1968 Amendment resolved the ambiguities inherent in the language of the 1933 Act by precisely defining the class of beneficiaries as "Navajo Indians residing in San Juan County." Whether such a class definition is precisely that originally intended by the 1933 Act is impossible to ascertain, but certainly Congress was the appropriate body to make a judgment as to how best to clarify the 1933 Act. And indeed the best reading of the 1933 Act is that the intended beneficiaries consist of a class of Navajo Indians residing in Utah, but not limited to residents of the Aneth Extension. Since the Navajo Reservation in Utah is located wholly within San Juan County, and since the few Navajo Indians residing off-Reservation also reside in San Juan County, it appears that Congress has elected to clarify the 1933 Act by defining the beneficiaries as all Navajos residing on or near the Reservation. Surely that is a reasonable reading of the intent of the 1933 Act; it could be exactly what Congress intended in 1933. In any event, Congress is the appropriate body to make such a judgment. *Chippewa Indians of Minnesota v. United States* 301 U.S. 358, 376 (1937) (Reconciling appar-

ent inconsistencies in a Congressional enactment relating to disposition of Chippewa lands, stating: "[A]n act of Congress should not be given a construction which will imperil its validity where it is reasonably open to a construction free from such peril.") *United States v. Thirty-Seven Photographs*, 402 U.S. 363, *reh. denied* 403 U.S. 924 (1971).

Conclusion

For the foregoing reasons, the 1968 Amendment does not materially change the class of beneficiaries included in the 1933 Act, and accordingly the judgment of the District Court holding such Amendment to be unconstitutional should be reversed.

Respectfully submitted,

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